APPENDIX A

United States Court of Appeals
For The Ninth Circuit

KAWASAKI MOTORS CORPORATION, U.S.A.,	)	No. 81-7647
	)	81-7758
Petitioner,	)	
	)	NLRB Case Nos.
	)	17-CA-8737
vs.	)	17-CA-8854
	)	17-CA-8936
NATIONAL LABOR RELATIONS BOARD,	)	17-RC-8473
	)	
	)	MEMORANDUM
Respondent.	)	
	)	

On Petition for Review of an Order of the
National Labor Relations Board
Argued and submitted July 9, 1982

Before: GOODWIN and NELSON, Circuit Judges, and SMITH,* District Judge.

The petition for the review of, and the cross-application to enforce, orders of the National Labor Relations Board (NLRB) are the latest episodes in an ongoing dispute between International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Kawasaki Motors Corporation, U.S.A. (Kawasaki) relative to the organization of the employees of Kawasaki at its plant in Lincoln, Nebraska.

The NLRB set aside an election in which the em-

*The Honorable Russell E. Smith, Senior United States District Judge, District of Montana, sitting by designation.

ployees of Kawasaki voted against union organization because Kawasaki, through its supervisors, had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act). 29 U.S.C. § 158(a)(1) and (3). The order also found that an employee, Bennett, had been illegally discharged because of his union activities in violation of Section 8(a)(1) and (3) of the Act.

Kawasaki contends that the evidence was insufficient to sustain the charge that Bennett had been illegally fired. The standard for review is stated in *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 908 (9th Cir. 1981), as follows: "We must enforce the Board's order if the Board correctly applied the law, and if the Board's findings of fact are supported by substantial evidence on the record viewed as a whole." Judged by that standard, the evidence in this case with respect to Bennett was sufficient.

Kawasaki does not contend that the evidence was insufficient to support the findings on the basis of which the election was invalidated. It does, however, claim that the entire proceeding was tainted by the misconduct of counsel' in these respects: Placing a tape recorder on counsel table in such a position that the discussions between Kawasaki's counsel and its representatives could be monitored; surreptitiously examining Kawasaki's files; and concealment of tapes on which actual speeches were recorded and which were exculpatory in character. The record reveals that the administrative law judge (ALJ) was keenly aware of all of the acts of counsel leading to these charges, and on some occasions rebuked counsel quite severely for them. The record does reveal a "lack of professionalism," as

the ALJ characterized it, but it does not appear that prejudice resulted. The NLRB, in review of the decision of the ALJ, noted each incident and specifically found that Kawasaki had not been prejudiced. Our review reveals no prejudice.

A more difficult problem is created by the failure of counsel to produce statements made by witnesses called by counsel at the close of their direct testimony, as required by § 102.118(b)(1) of the NLRB's regulations. 29 C.F.R. § 102.118(b)(1). Kawasaki made proper requests that the statements of NLRB's witnesses be provided, and was assured that they had been. That some statements had not been produced was in each instance discovered by Kawasaki, on cross-examination or otherwise. However, statements of two witnesses were mentioned by the witnesses during their cross-examination and were produced during cross-examination. As to the others, counsel did tardily furnish the statements and offered to produce the witnesses for further cross-examination. Kawasaki declined to cross-examine those witnesses.

We agree with Kawasaki that a tardy production of a witness is not the equivalent of a timely production; that a tardy production gives the party calling the witness a chance to discuss any discrepancies between the statements and the previously given testimony; and that cross-examination may be much more effective if the witness has no chance to prepare for it. In this case the charge that there was prejudice is general. In no instance is it shown that the general tenor of the statements was different or that there was some contrary statement of an isolated fact.[2] We have made an effort to compare the testi-

mony of those witnesses whose statements were produced after the initial cross-examination had been completed, and it appears in general that the statements are consistent with the testimony given and would not have afforded Kawasaki any substantial ammunition for impeachment. In short, prejudice may be found only if it can be presumed.

A different problem exists with respect to the witnesses Harm and Berg. They were initially examined by the NLRB in August of 1979. In November the hearing was recessed until January 23, 1980. Some time in December Kawasaki learned that after the adjournment Harm and Berg had given statements to the Department of Labor. Kawasaki made no effort to obtain the statements by subpoena or otherwise until the day the hearing was resumed. At that time Kawasaki called upon the NLRB to produce the statements. That was not done, and the ALJ refused to strike the testimony of Harm and Berg.

The NLRB held that Rule No. 102.118(b)(1) requires that the NLRB furnish statements given prior to the direct examination of the witness and not to those given after the examination. Kawasaki urges that the examination of the witness is not complete until the cross-examination has been completed and hence that the rule was violated in this case. Contrary to the opinion of the NLRB, we believe that the rule fairly interpreted would require that any statement in the possession of counsel at the time cross-examination commences be produced by the NLRB.

Although the statements were not in the possession of counsel at the time they were requested, they were in possession of the Department of Labor. Un-

der the ruling in *Harvey Aluminum v. NLRB,* 335 F.2d 749 (9th Cir. 1964), it is required that statements be produced both under Rule 102.118(b)(1) and because, as Judge Browning stated in *Harvey, Id.* at 753, "justice requires no less."

Still remaining, however, is the question of whether under the circumstances of this case it was within the discretion of the court to refuse to strike the testimony of Harm and Berg. The procedural differences between this case and *Harvey* are substantial and might require that the cases be distinguished. We do not decide whether, under the facts here, it was not within the discretion of the ALJ to deny Kawasaki's motion because in our opinion the error, if any, was harmless.

In *Harvey* the NLRB's findings were dependent on the credibility of three witnesses for the NLRB as against eight for Harvey Aluminum, and the statements of these three witnesses were what had been requested.

In this case the ALJ made meticulous findings. He analyzed the evidence as to each of twelve charges of violations of Section 8(a)(1) of the Act, and the discharge of Bennett and Clare.

We are not advised by Kawasaki as to the manner in which the testimony of any of the affected witnesses (those whose statements were not furnished or were tardily furnished) was related to any of the specific findings. The ALJ in his findings detailed the evidence upon which he relied and the credibility of the witnesses whose testimony was the basis for the findings. He dismissed two of the twelve charges. In five instances employees, not including any affected witnesses, testified as to threats by offi-

cials of Kawasaki. These witnesses were found credible, and the officials said to have made the statements were not called. In two instances the ALJ found that the witnesses, not including affected witnesses, called by the counsel were more credible than those called by Kawasaki. In one instance the finding depended on the credibility of the affected witness Berg, another on the credibility of the affected witness Harm, and in a third instance it is impossible to tell which witnesses were among what the ALJ charactered as "the number of employees who testified in this case." If, however, any findings dependent upon the testimony of any of the affected witnesses were set aside, still the conclusion reached that Kawasaki had been guilty of unfair labor practices would remain.

As to the requests for reinstatement, Bennett's was granted and Clare's denied. Again, the ALJ painstakingly detailed the evidence, and in Bennett's case the testimony of the affected witnesses was not mentioned in the findings of the ALJ.

By nothing we have said do we condone the conduct of counsel. Particularly where the NLRB is both prosecutor and judge it is incumbent on it not only to preserve an image of fairness, but to be fair as well.

The petition for review is denied, and the orders in Nos. 17-CA-8737, 17-CA-8854, 17-CA-8936, and 17-RC-8473 are affirmed and shall be enforced.

FOOTNOTES

'(Page 2) Counsel for the General Counsel of the NLRB are referred to as "counsel."

[2](Page 3) A possible exception exists in the case of witness Clare. As to her the administrative law judge specifically found that she was not credible and denied her petition for reinstatement.

APPENDIX B

United States of America

Before the National Labor Relations Board

KAWASAKI MOTORS CORPORATION, U.S.A.

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)	Cases 17--CA--8737, 17--CA--8854, 17--CA--8936, and 17--RC--8473

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On January 29, 1981, Administrative Law Judge Frederick C. Herzog issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, the Union filed cross-exceptions, and the General Counsel and the Union filed answering briefs to Respondent's exceptions.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Admin-

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[1]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

istrative Law Judge and to adopt his recommended Order.[3]

The General Counsel has excepted to the Administrative Law Judge's finding that counsels for the General Counsel knowingly offered as an exhibit a document which was not a true copy. The General Counsel contends that, at the time the document in question was offered, counsels for the General Counsel had no knowledge that it was not a true copy. We find merit in the General Counsel's exception.

The record reveals that, during the Union's second election campaign, Respondent posted a notice dated April 10, 1979, regarding bomb threats. The General Counsel alleged that this notice violated Sec. 8(a)(1) of the National Labor Relations Act, as amended. During the hearing counsels for the General Counsel introduced and offered as an exhibit a copy of the notice through the testimony of Bruce Berg, who identified the copy as "the posting that went up." However, during *voir dire* examination by Respondent's counsel, Berg testified that the notice which Respondent had posted differed from the document he had identified in size, type, and heading. The Administrative Law Judge thereupon rejected the offer of the exhibit. Counsel for the General Counsel subpoenaed from Respondent a true copy of the notice, which was subsequently offered and received into evidence.

Nothing in the record indicates that counsels for the General Counsel had any knowledge prior to the *voir dire* examination of Berg that the copy of the notice which they offered into evidence was not a true copy. Further, upon discovery of this fact, counsels for the General Counsel acted promptly in obtaining and introducing into evidence a true copy of the notice, which differed only in collateral respects from the copy first offered. Under these circumstances, we find, contrary to the Administrative Law Judge, that counsels for the General Counsel did not knowingly offer an untrue copy of the notice into evidence.

[2]The Administrative Law Judge indicated in dicta that a discharge was unlawful if it were shown that the discharge was, in part, discriminatorily motivated. We expressly disavow this statement. See *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

[3]We find that the extraordinary remedies requested by the Union in its cross-exceptions are not warranted to remedy the

Respondent has excepted to the Administrative Law Judge's refusal to grant Respondent's motions for a mistrial based on the conduct of counsels for the General Counsel during the hearing. Specifically, Respondent objects to the use by counsels for the General Counsel of a tape recorder; their rifling through Respondent's papers; their knowingly offering as an exhibit a document which was not a true copy; their failure to pay their share of the cost of transcribing certain tapes offered into evidence; their failure to tender witnesses' affidavits to Respondent prior to Respondent's cross-examination; and their refusal to obtain affidavits given by two witnesses to the Department of Labor.

We find no merit in Respondent's exception. As discussed below, none of the conduct of counsels for the General Counsel resulted in prejudice to Respondent, and thus their conduct does not warrant a mistrial.

With regard to the use of a tape recorder, the rec-

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unfair labor practices found herein. Chairman Fanning agrees with his colleagues that the extraordinary remedies requested by the Union in its cross-exceptions, including imposition of a bargaining order, are not warranted here. In so finding, Chairman Fanning continues to adhere to his petition in *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), wherein he stated that in certain extraordinary circumstances a bargaining order should be given even absent a card majority. Chairman Fanning believes, however, that the unfair labor practices found herein are not sufficiently extensive to support imposition of this extraordinary remedy. Member Zimmerman agrees with Chairman Fanning that, on any view of the applicable law, imposition of a bargaining order absent a card majority is not appropriate in the present case. Therefore Member Zimmerman finds it unnecessary to express a view on the bargaining order issue presented in *United Dairy*, in which he did not participate.

ord reveals that, prior to the calling of the first witness, counsels for the General Counsel placed a tape recorder on the table in front of them. Noticing the tape recorder, the Administrative Law Judge instructed counsels for the General Counsel to remove it. Counsels for the General Counsel requested permission to record the testimony of the first witness, but the Administrative Law Judge refused permission. There is no evidence that counsels for the General Counsel operated the tape recorder subsequently during the hearing in disregard of the Administrative Law Judge's instructions. Nor is there any evidence that counsels for the General Counsel intended to use the tape recorder for any purpose other than to record the testimony of the first witness. Under these circumstances, although counsels for the General Counsel injudiciously failed to seek permission from the Administrative Law Judge prior to commencement of the hearing for use of the tape recorder, we find that no prejudice resulted from this brief incident.

With regard to the rifling of Respondent's papers, the record reveals that at one point in the proceeding one of the counsels for the General Counsel walked behind Respondent's counsel table, allegedly to examine an exhibit that had been offered into evidence by Respondent. Respondent's counsel, who was at the entrance to the hearing room, immediately objected to this conduct. The Administrative Law Judge instructed counsel for the General Counsel to leave Respondent's counsel table, and counsel for the General Counsel complied. There was no evidence that counsel for the General Counsel's conduct was motivated by a desire to examine any of

Respondent's trial notes or other internal memoranda nor that counsel for the General Counsel in fact examined such documents. Thus, although counsel for the General Counsel displayed injudicious conduct, we find that this conduct did not result in prejudice to Respondent.

With regard to the offer of a document as an exhibit which was not a true copy, we find, as discussed in footnote 1, that counsels for the General Counsel had no knowledge prior to the offer of the document that it was not a true copy. Accordingly, as there was no misconduct on the part of counsels for the General Counsel in this regard, no prejudice resulted to Respondent.

With regard to the failure of the General Counsel to pay his share of the cost of transcribing certain tapes, the record reveals that on the third day of the hearing, during a colloquy between the parties and the Administrative Law Judge, the Administrative Law Judge learned for the first time that counsels for the General Counsel had in their possession tape recordings of speeches of various members of Respondent's management taped by employees. In view of the fact that there had been extensive prior testimony in the hearing regarding what Respondent's officials had said in those speeches, the Administrative Law Judge instructed counsels for the General Counsel that, if this corroborative evidence were not offered into evidence, the Administrative Law Judge might draw adverse inferences to the General Counsel's position. After a recess, counsels for the General Counsel offered into evidence eight of the nine tapes in their possession. The ninth tape was not offered by counsels for the General Counsel

because it did not relate to the unfair labor practices alleged; however, this tape was offered into evidence by the Union in support of its election objections. Noting that the tapes had to be authenticated before he could receive them into evidence, the Administrative Law Judge inquired as to whether counsels for the General Counsel intended to call witnesses for such purpose. Counsels for the General Counsel stated that they had no witnesses who could testify to the authenticity of the tapes.

Thereupon, in an off-the-record discussion, the parties decided to have duplicates of the tapes made, to send the originals to a sound studio to filter out the extraneous noises, and then to have transcripts made of the tapes. Counsels for the General Counsel indicated that the expense entailed in this procedure might prevent the General Counsel's agreement to it and called their superiors at the Regional Office to discuss the matter.

When the hearing resumed, counsels for the General Counsel indicated that the General Counsel would agree only to share in the expense of transcribing three of the eight tapes offered as General Counsel's exhibits because two of the remaining tapes did not relate to the unfair labor practices alleged and the other tapes, containing a speech the transcript of which had already been received into evidence, were unnecessary to transcribe. The Administrative Law Judge asked counsels for the General Counsel if their present position meant that they wished to withdraw their offer of certain tapes as General Counsel's exhibits, and counsels for the General Counsel responded that they were maintaining their offer of all eight tapes. The Administra-

tive Law Judge thereupon directed the parties to proceed with the authentication of the tapes and adjourned the proceedings to allow the parties the time necessary for such procedure. During the adjournment, the Regional Director withdrew an allegation of the complaint, rendering, from the viewpoint of counsels for the General Counsel, all of the tapes irrelevant as evidence. Consequently, counsels for the General Counsel notified Respondent and the Union that the General Counsel was unwilling to share in the costs of transcribing any of the tapes unless the parties had relied on his previous position. However, counsels for the General Counsel made no attempt to withdraw their offer of any of the tapes as General Counsel's exhibits. It appears that the General Counsel has refused to date to pay any portion of the transcription costs of the tapes.

In view of the fact that certain discussions between the parties regarding the tapes and the payment of transcription costs occurred off the record, we are unable to determine whether the General Counsel at any point expressly agreed to pay a portion of the transcription costs of all tapes and subsequently reneged on this agreement. However, in our opinion, such resolution is unnecessary. We find that, since the tapes were General Counsel's exhibits, the General Counsel was obligated to share in the transcription costs necessary for their authentication. The General Counsel voluntarily chose to offer the tapes into evidence rather than risk any adverse inferences drawn by the Administrative Law Judge, and he chose not to withdraw any or all of the tapes after a review of them convinced him that none of the tapes was relevant as evidence. Thus, it

appears that the General Counsel took the inconsistent position of wanting the tapes in evidence but not wanting to pay for their transcription, without which the tapes were useless and could not be received into evidence. We do not approve of the General Counsel's position in this matter. However, Respondent has failed to establish any prejudice resulting from this matter. Respondent also wanted the tapes in evidence and subpoenaed the tapes from the General Counsel, presumably for the purpose of introducing them into evidence if the General Counsel had not done so. Thus, the General Counsel's position in regard to the tapes in no way thwarted Respondent's desire to have the Administrative Law Judge consider this evidence or prevented a complete record. In any event, although the Administrative Law Judge did consider this evidence, he did not rely on anything contained in the tapes in making any of his findings and conclusions. Under these circumstances, the General Counsel's failure to pay his share of the transcription costs of the tapes did not result in any prejudice to Respondent's case.

With respect to the failure of counsels for the General Counsel to tender witnesses' affidavits to Respondent, the record reveals that, upon conclusion of the direct examination of each witness called by counsels for the General Counsel, Respondent's counsel requested all prior statements of the witness. On each occasion counsels for the General Counsel complied with this request but, as to six witnesses, it was discovered, after Respondent's cross-examination had begun or had been completed, that counsels for the General Counsel had additional statements in their possession. These additional

statements were promptly furnished to Respondent.

These actions constitute undisputed errors on the part of counsels for the General Counsel. However, Respondent failed to establish that the errors were prejudicial. The record reveals that the additional statements of two of the witnesses were discovered and furnished to Respondent while the witnesses were still on the stand, allowing Respondent to utilize the additional statements in its cross-examination. Further, the testimony of another witness whose additional statement was furnished to Respondent after his cross-examination had been concluded was totally discredited by the Administrative Law Judge. Moreover, there was no evidence of bad faith on the part of counsels for the General Counsel. In any event, pursuant to an order of the Administrative Law Judge, counsels for the General Counsel returned to the hearing for further cross-examination all witnesses who had testified subsequent to the first witness whose statements had not been timely furnished to Respondent. However, Respondent chose not to engage in any further cross-examination of any of these witnesses regarding their prior testimony. Under these circumstances, we find that the errors of counsels for the General Counsel in this regard were not prejudicial to Respondent. See *Carlisle Paper Box Company*, 168 NLRB 706 (1967), enfd. 398 F.2d 1 (3d Cir. 1968).

Finally, with respect to the General Counsel's refusal to obtain from the Department of Labor the affidavits of two witnesses, the record reveals that on December 17 or 18, 1979, during an adjournment of the hearing, Respondent's counsel learned that some employees had given statements to a Department of

Labor investigator at some time after November 29, 1979, the date of the last adjournment of the hearing. Respondent made no attempt to obtain these affidavits from the Department of Labor. Further, Respondent did not request the General Counsel to obtain these affidavits until the hearing resumed on January 23, 1980. Pursuant to agreement of the parties, the Union's counsel and counsels for the General Counsel questioned all employee witnesses to ascertain if they had given statements to other Federal agencies. Only Bruce Berg and Greg Harm, who had testified on August 14 and 15, 1979, indicated that they had given statements to a Department of Labor investigator at some time after the hearing journed in November 1979. Respondent thereupon requested the Administrative Law Judge to direct the General Counsel to contact the Department of Labor and obtain these statements. The Administrative Law Judge denied this request. We find no error in the Administrative Law Judge's ruling. The requirement that a witness' statements be furnished upon request to opposing counsel prior to cross-examination applies only to statements in existence at the time of the witness' testimony which relate to the subject matter of the testimony. National Labor Relations Board Rules and Regulations, Series 8, as amended, Sec. 102.118 (b)(1). As the statements of Berg and Harm were given to the Department of Labor subsequent to their testimony at the hearing, the General Counsel was under no obligation to furnish these statements to Respondent. Under these circumstances, we find that the Administrative Law Judge correctly denied Respondent's request that the General Counsel be directed to obtain these statements.

In sum, we find that Respondent was accorded a fair hearing and that the Administrative Law Judge correctly denied Respondent's motions for a mistrial.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Kawasaki Motors Corporation, U.S.A., Lincoln, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,* except that the attached notice is substituted for that of the Administrative Law Judge.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 17 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged

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* In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on backpay due based on the formula set forth therein.

in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[5] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

Dated, Washington, D.C. August 3, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list,

APPENDIX

Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to give evidence, the National Labor Relations Board has found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice to assure you of your rights under the law and to advise you of the actions we are required to take to remedy our violations of the Act.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT fire, lay off, or otherwise discriminate against any employee for engaging in union activities or giving aid or support to any labor organization.

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containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 17 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

WE WILL NOT threaten employees by advising them

- that they or others may be discharged
- that we might impose more onerous job duties
- that we might close or move our plant or any of its work
- that we may withhold promotions, job reviews, or benefits
- that selection of a union would be futile.

WE WILL NOT promise benefits to employees in order to persuade them to stop their union activities or support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights set forth above, which are among those protected by the National Labor Relations Act.

WE WILL offer Dan Bennett immediate and full reinstatement to his former position of employment, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Dan Bennett whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

KAWASAKI MOTORS CORPORATION, U.S.A.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Two Gateway Center, Room 616, Fourth at State, Kansas City, Kansas 66101, Telephone 816--374--4688.

APPENDIX C

United States of America
Before The National Labor Relations Board
Divison of Judges
Branch Office
San Francisco, California

KAWASAKI MOTORS CORPORATION, U.S.A.	Cases
and	17-CA-8737
INTERNATIONAL UNION,	17-CA-8854
UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL	17-CA-8936
IMPLEMENT WORKERS OF	17-RC-8473
AMERICA (UAW)	

Louis H. Kelly, Esq. and *Jack D. McCarthy, Esq.*,
of Kansas City, KS, for the
General Counsel.
Katz, Friedman, Schur and Eagle,
by *Irving M. Friedman, Esq.*,
of Chicago, IL, for the
Charging Party and Petitioner.
Tate, Bruckner and Sykes,
by *Charles E. Sykes, Esq.*,
Terry E. Schroeder, Esq., and
Arthur T. Carter, Esq.,
of Lincoln, NB, for the Respondent.

Decision

Frederick C. Herzog, Administrative Law Judge

Statement of the Case

This case had its inception when the International Union, United Automobile, Aerospace and Agricul-

tural Implement Workers of America (UAW)[1] filed a petition for an election to be conducted by the National Labor Relations Board in a unit of production and maintenance employees at the Lincoln, Nebraska plant of Kawasaki Motors Corporation, U.S.A.[2] Pursuant to that petition in Case No. 17-RC-8473 and the ensuing decision and direction of election by the Regional Director for the 17th Region of the National Labor Relations Board, an election by secret ballot was conducted on June 2, 1978. However, on September 29, 1978, the Respondent agreed with the Regional Director to avoid and set aside the results of that election. Pursuant thereto and a supplemental decision on objections and order setting aside the election, which issued October 18, 1978, a rerun election by secret ballot was conducted on April 19, 1979. The tally of ballots showed that there were approximately 516 eligible voters, 207 of whom cast their votes in favor of, and 257 of whom cast their ballots against, representation by the Union. There were no void ballots and 28 ballots were challenged. Thereafter, on April 24, 1979, the Union filed timely objections to the conduct of the election. The Regional Director subsequently determined that certain complaint allegations, set forth below, encompassed, in part, acts and conduct set forth in the Union's objections numbered 2, 3, 4, 8, 12, 14, and 15; accordingly, he consolidated said complaints with these objections to the election. On July 13, 1979, the Board denied the request for review of the Regional Director's decision in this matter.

The complaints, issued by the Regional Director

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[1] Hereinafter referred to as the Union.

[2] Hereinafter referred to as the Respondent.

which relate to this case are summarized, as follows:

Case No. 17-CA-8491

On August 30, 1978, the Union filed a charge alleging that the Respondent violated Section 8(a)(1) and (2) of the Act by conduct preceding the June 2, 1978 election. On October 2, 1978, a complaint issued thereon, but alleging only violations of Section 8(a)(1). The Respondent's timely answer denied all wrongdoing. On October 17, 1978, the Respondent and the Regional Director entered into a unilateral informal settlement agreement, providing remedial action on the part of the Respondent for the alleged violations of Section 8(a)(1) of the Act, though further expressly providing that the Respondent did not admit having engaged in any violative conduct. On July 25, 1979, the Regional Director withdrew his approval for the settlement agreement, noting the pendency of the complaints in Cases Nos. 17-CA-8854 and 17-CA-8936, and his determination that there had not been substantial compliance with the terms of the settlement agreement. (While the settlement agreement was subsequently reinstated by the Regional Director, the circumstances of its reinstatement are best explained below.)

Case No. 17-CA-8737

On January 22, 1979, the Union filed the charge in Case No. 17-CA-8737 alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee, Connie Clare, on August 24, 1978. On July 26, 1979, the Regional Director issued an order consolidating Cases Nos. 17-CA-8737 and 17-

CA-8491 in a complaint alleging violations of Section 8(a)(1) and (3) of the Act, including the discharge of Connie Clare on or about August 24, 1978, and the violation of the settlement agreement in Case No. 17-CA-8491 by conduct complained of in Cases Nos. 17-CA-8854 and 17-CA-8936. Also on July 26, the Regional Director further ordered the consolidation for hearing of the allegations and objections in Cases Nos. 17-CA-8491, 17-CA-8737, 17-CA-8854, 17-CA-8936 and 17-RC-8473.

On August 7, 1979, the Regional Director reconsidered his earlier withdrawal of his approval of the settlement agreement in Case No. 17-CA-8491, reinstated the settlement agreement, and ordered that Case No. 17-CA-8491 be severed from Cases Nos. 17-CA-8737, 17-CA-8854, 17-CA-8936 and 17-RC-8473. On August 8, 1979, the Regional Director amended his consolidated complaint in Case No. 17-CA-8737. The Respondent's answer to the complaint in Case No. 17-CA-8737 denied all wrongdoing.

Case No. 17-CA-8854

On March 26, 1979, the Union filed the charge in Case No. 17-CA-8854, alleging violations of Section 8(a)(1) of the Act by the Respondent in the course of the pre-election campaign for the rerun election. On April 26, 1979, the Regional Director issued a complaint based thereon. The Respondent's timely answer denied all wrongdoing.

Case No. 17-CA-8936

On April 26, 1979, the Union filed the charge in Case No. 17-CA-8936, alleging violations of Section 8(a)(1) and (3) of the Act, including the April 11,

1979 termination of employee Dan Bennett and the April 17, 1979 termination or refusal of full-time employment to employee Richard Hawkins. On June 7, 1979, the Regional Director issued a complaint in Case No. 17-CA-8936 alleging violations of Section 8(a)(1) and (3) of the Act, including the April 11, 1979 termination of the employment of Bennett. As previously noted, at that same time the Regional Director ordered that Cases Nos. 17-CA-8936 and 17-CA-8854 be consolidated and heard beginning August 14, 1979. On June 12, 1979, the Respondent filed its answer denying all wrongdoing.

Summary

Pursuant to notice, the hearing herein began before me in Lincoln, Nebraska, on August 14, 1979 and continued on August 15 and 16, at which time it was adjourned until September 25, 1979 to allow the parties to have certain evidentiary material prepared for use during the trial of this case. The adjournment was requested by both counsel for the Respondent and counsel for the Union, and was not opposed by counsel for the General Counsel.

The hearing was resumed on September 25, 1979, and continued on September 26, 27 and 28, 1979. It was then adjourned.

The hearing resumed on November 27 and continued through November 28 and 29, 1979. At that time it was adjourned to allow consideration of questions relating to the conduct of counsel for the General Counsel.

On December 5, 1979, I issued an order allowing counsel for the General Counsel to participate fur-

ther in the hearing and scheduling the case's resumption for January 22, 1980.

Pursuant thereto, the hearing resumed on January 22, and was concluded on January 23 and 24. All parties filed briefs on or before March 31, and each such brief has been carefully considered.

Thereafter, on June 16, the General Counsel moved to correct the record in approximately 150 specific instances as well as in other general respects. My ruling on this motion, which was opposed in part by the Respondent, is set forth below.

All parties appeared at the hearing and were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Based upon the record thus compiled, I make the following findings.

Findings of Fact

I. The Business of Respondent

The pleadings herein demonstrate that there is no dispute that the Respondent is a corporation and that it is engaged in the design, production, distribution and non-retail sale of motorcycles and other diversified recreational products at various facilities, including a facility located at Lincoln, Nebraska, with which this case is concerned. In the course and conduct of its operations within the State of Nebraska, the Respondent annually purchases goods and services having a value in excess of $50,000 directly from sources located outside the State of Nebraska. Accordingly, I find and conclude that the Respondent is an employer engaged in commerce

within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization

The pleadings further demonstrate that no dispute existed, at any time material herein, with respect to the Union's status as a labor organization. Accordingly, I find and conclude that the Union is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Respondent's Agents and Supervisors

By its various answers to the several complaints herein, the Respondent has admitted that the following named persons are supervisors and agents of the Respondent, acting on its behalf, within the meaning of Section 2(11) and (13) of the Act:

1)	Dale Barkhurst[2]	Production Foreman;
2)	Dennis Butt	Vice President;
3)	Jack Calendar	Gas Tank Paint and Decal Foreman;
4)	Roger DeBaere[2]	Supervisor;
5)	Steve Eicher	General Foreman;
6)	Gene Fisher[2]	Warehouse Manager;
7)	Woody Guthrie[2]	Foreman, Jet Ski Department;
8)	Max Hosack	Maintenance Foreman, 2nd Shift;
9)	Chris Lloyd[2]	Assistant Personal Director;
10)	Harold Long[2]	Supervisor, Wheels Department;
11)	Howard Lyons[2]	Supervisor;
12)	Mario Mendez[2]	Supervisor;
13)	Tina Parmly	Paint & Black Line Departments Foreman;
14)	Ron Polivka	Production Superintendent;
15)	Allan Priest	Crating Foreman;
16)	Robbie Robbins	Foreman;
17)	Robert G. Summers[2]	Personnel Director;

[2] The Respondent's various answers did not specifically deny or admit the allegations respecting these persons. Accordingly, I deem their status to have been admitted, as alleged.

18) Don Van De Walker	Production Foreman, Wheels Department;
19) Arnie Weiss	Supervisor;
20) Dick Weyers	Foreman, Finishing Department;
21) Cliff Whisenhunt	Foreman, Bonding Department.

IV. The Motion to Correct the Record

As noted, the General Counsel has filed a motion requesting that I order the transcript to be corrected in more than 150 instances. Respondent has stated its opposition to portions of the General Counsel's motion.

I have reviewed the transcript and the requested corrections. The great majority of requested corrections relate to transcript errors which are plain and evident to any reader. Many other similar errors have been noted by me in this transcript but, since no motion has requested their correction, I make no findings with respect thereto.

However, I find merit in the General Counsel's motion in each instance where he has requested a correction, other than those set forth below. Even though a number of the requested corrections were opposed by the Respondent, I have granted the General Counsel's motion where the sense, spelling or usage of the word or phrase in question seems evident from the context in which it was used. And in any instance where the Respondent's opposition has been unsuccessful, I note my reason therefor below. Finally, in the several instances where no party has requested, or opposed, a correction, but which I have made *sua sponte*, I set forth my reason(s) below.

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[3] Supra.

Page	Line	From	To	Ruling	Reason for Ruling
11	12	Board's	Board's Unga	Granted	Sense of usage is clear in transcript.
23	25	the	that	Granted	Sense of usage is clear in transcript.
26	19	impassable	impossible	Granted	Sense of usage is clear in transcript.
234	15	MR. _____	MR. SYKES	Denied	Transcript already reads as requested.
371	15	MR. McCARTHY	MR. SYKES	Granted	Context shows who was speaking.
371	17	MR. McCARTHY	MR. SYKES	Granted	Context shows who was speaking.
400	3	No. 38	No. 30	Granted	Sense of context, and No. 38 is a medical report.
431	21	on	own	Granted	Spelling.
450	15	12:35	12:55	Granted	Context makes it clear what was said.
557	20	taking	taping	Granted	Spelling and sense derived from context.
557	24	taking	taping	Granted	Spelling and sense derived from context.

649	4	McCARTHY	SYKES	Granted	Sense derived from context.
650	13	existing defense	a shifting defense	Granted,	Sense derived from *sua sponte* context.
650	16	existing sexual	a shifting position	Granted,	Sense and *sua sponte* recollection.
650	16	existing sexual position	existing ———	Denied	See above.
929	6	tapes, he	tapes if he	Granted	Sense derived from context.
1294	1	detracts	tracks	Granted	Spelling and sense derived from context.
1317	4	jobbed	robbed	Granted,	Recollection. *sua sponte*
1347	3	1979	1978	Granted	Squares with other references.
1357	10	a recording	a tape recorder	Denied	Recollection does not support.
1458	10	pirate	private	Granted	Recollection.
1471	20	2.118	102.118	Granted	Squares with context.
1476	16	47	47 and 48	Denied	Recollection does not support.

1554	25	McCARTHY	SYKES	Granted	Context shows who was speaking.
1562	16	McCARTHY	SYKES	Granted	Context shows who was speaking.
1562	17	States, no.	States.	Granted	Sense derived from context.
1562	Insert between lines 17 & 18	MR. McCARTHY:	No.	Granted	Sense of context.
1565	17	this memorda	these memoranda	Granted	Sense derived from context and spelling.
1577	2	McCARTHY	SYKES	Granted	Context shows who was speaking.
1579	20	Report	Reporter	Denied	Transcript already reads as requested.
1586	18	voiding	avoiding	Granted	Spelling and sense derived from context.
1597	2	ther	their	Denied	"the" is the correct change rather than as requested.

V. The Alleged Violations of Section 8(a)(1)[4]

(1)

Allegations: It is alleged that on March 23, 1979, Dick Weyers threatened an employee with plant closure if employees selected the Union as their representative (GC Exhibit 1(i), paragraph 5(a)), and threatened to impose more arduous work duties upon an employee because of that employee's union activities (GC Exhibit 1(i), paragraph 5(b)).

Facts: In mid or late March, 1979, according to employee Clover, Weyers held a meeting with the employees in his department. Clover recalled Weyers saying that if the Union got in at Kawasaki, and if the Union tried to get a contract like General Motors', the Respondent would not be able to afford it and would probably have to close the plant. She also recalled Weyers pointing at her, as she wore a button indicating allegiance to the Union, and saying that if he wished he could require her to sand mufflers, which she described as a "dirty job," that he could give her a hard time for smoking a cigarette or for going to the bathroom too often.

Weyers recalled the meeting, stating that he called it to tell employees of the election and to answer their questions to the extent permitted by law. However, he denied saying anything to Clover. He denied telling employees of possible closure of the plant, or that he said anything about employees' usage of the bathroom. He went on to recite his own personal preference for the job of sanding mufflers.

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[4] During the course of the trial, the General Counsel withdrew a portion of paragraph 5(a) and all of paragraph 5(f) in Case No. 17-CA-8936 (Tr. 672).

Conclusion: Clover was a more convincing witness than Weyers, who was nervous and vague. Clover's testimony is credited over that of Weyers in any instance of conflict, despite the failure of the General Counsel to corroborate Clover's testimony. It is concluded that Weyers' comments extended beyond the protections afforded free speech commentaries upon economic necessity and, as such, violated Section 8(a)(1) of the Act.

(2)

Allegations: It is alleged that Tina Parmly, on or about March 23, 1979, threatened an employee with plant closure (GC Exhibit 1(i), paragraph 5(a)), and threatened to withhold a promotion from an employee because of the employee's union activities (GC Exhibit 1(i), paragraph 5(c)), and threatened employees with the loss of their job reviews because of the employees' union activities (GC Exhibit 1(i), paragraph 5(d)), and on both March 18 and 23, 1979, threatened employees with the loss of unspecified benefits because of their union activities (GC Exhibit 1(i), paragraph 5(e)).

Facts: Employee Thiellen testified that on March 23, 1979, Parmly told him and other employees meeting in the cafeteria that the requests to upgrade their department's labor grade(s) were "hung up" because of the union election, that their plant was a "very severable arm" of the Respondent's company, and that the Respondent would take better care of the people than the Union.

Further, according to employee Leuty, Parmly conducted a meeting for employees at her desk in the finishing department early one morning in mid

to late March 1979. Leuty recalled Parmly stating that if the Union got in emloyees would have no voice regarding anything to do with their jobs, that they could either gain or lose benefits, and that there could be strikes which get "pretty ugly."

Conclusion: Thiellen demonstrated good and precise recollection while testifying, giving a strong impression of credibility. Leuty, while giving a good impression for veracity, seemed unsure of details and prone to testify in conclusionary terms. However, Parmly was not called as a witness by the Respondent to rebut any of the testimony of either Thiellen or Leuty. Accordingly, I conclude and find that both Thiellen and Leuty are to be credited, and thereby establish the accuracy of the allegations.

(3)

Allegation: It is alleged that on or about March 26 and March 28, 1979, Hosack threatened employees by stating that their efforts to select the Union as their collective-bargaining representative would prove to be a futility, and by telling them that the Respondent would close the plant if the Union were selected by the employees (GC Exhibit 1(n), paragraph 5(a) and 5(e), respectively).

Facts: According to employee Bennett, the Respondent held meetings of employees to introduce Butt,[5] the new vice-president, sometime during the time period of 2 months preceding the April 19, 1979

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[5] That Butt met with employees, to be introduced and speak in general terms about the efforts then underway to unionize the plant, is not in dispute. Nor is the fact that such meetings occurred around the end of March, thereby establishing the general time of the events described by Bennett.

election. Later during the day of the meeting which Bennett attended Hosack walked up to him while he was working and told him that he was showing how little he cared about the Respondent company by wearing a button indicating support for the Union. Bennett testified that Hosack told him that the plant was a mere "drop in the bucket" compared to the Respondent's facility in Japan, and that if the Union got in the Lincoln, Nebraska plant would be closed, in his opinion. Bennett recounted Hosack's statement that there would definitely be a strike if the Union secured representational rights. Bennett also recalled that he and Hosack argued the matter for some 2 to 3 hours.

Bennett next testified to a meeting conducted by Hosack approximately 2 weeks prior to the April 19 election, attended by himself, Hosack and four others. Bennett testified that Hosack told this small assemblage in his office that Butt, with whom he'd just met, would refuse to sign any contract with the Union, that the Respondent was losing money and that if the Union got in they would have to close down the plant. Hosack was said to have told them they'd definitely have to go on strike if the Union should get in, and to have advised them to go out and buy walking shoes, evidently to be used by them while picketing. Bennett testified that Hosack went on to say that the Respondent would probably just fire all of them because he understood that the Union would desire that apprentice mechanics possess better qualifications than theirs.

Bennett's testimony regarding this latter meeting with Hosack has not, in my opinion, been corroborated by Slossen, who testified that "approximately in the last half of March 1979" Hosack walked into

the cafeteria one night around 7:00 p.m. and reminded Slossen and other employees that they'd better have good shoes because they were destined to do a lot of walking, that the Respondent would not accept the Union, that the Respondent was losing money and might close the Lincoln, Nebraska facility, and that, even if the plant weren't closed, the Respondent would operate with supervisory personnel and hire a new complement of workers.

I have difficulty accepting such testimony as corroborative of Bennett's inasmuch as it places the meeting on a different date, at a different time of day, at a different location in the plant, and with different people present. And, if that were not sufficient to cause me to reject Slossen's "corroboration," I note that the testimony as to the substance of what was supposedly said by Hosack does not bear close analysis in an attempt to dovetail, or even reconcile, the two accounts.

However, I find that, even absent corroboration, Bennett's version of these statements by Hosack must be credited. First of all, Bennett was candid and forthright in demeanor while testifying. While he manifested some inability to recall each detail, such as dates, with precision, he was apparently testifying truthfully, without any attempt to mislead or enlarge. And, secondly, Hosack was not called by the Respondent to refute Bennett's testimony.

Respondent's counsel represented at the trial that Hosack became ill during one of the trial's adjournments and, generally speaking, that the nature of Hosack's illness prevented him from testifying accurately. Additionally, Respondent's counsel placed certain medical records into evidence purporting to

show that Hosack's failure to testify was caused by his illness, rather than any reluctance of the Respondent to call him as a witness.

The records, which are clearly hearsay, purport to demonstrate that Hosack suffered an acute illness, starting in early October 1979, that Hosack was hospitalized for approximately 2 weeks, and that his illness manifested itself as a neurological problem resulting in seizures.

In my opinion, the Respondent has thereby satisfied its obligation to demonstrate why I should not draw an unfavorable inference from its failure to call Hosack as a witness. And I draw no such inference here, despite the failure of the Respondent to produce expert medical testimony concerning Hosack's condition at the time of the trial.

However, no matter how one may sympathize with the Respondent's resultant inability to refute some of the testimony of the General Counsel's witness, neither is there any warrant for shifting the onus for the failure to produce Hosack to the General Counsel. Nor, I believe, is there any basis for failing to credit Bennett's testimony, which, for whatever reason, stands unrefuted and apparently worthy of belief.

Thus, I find that Hosack made the statements attributed to him by Bennett and that a number of such statements were violative of Section 8(a)(1) of the Act, despite Bennett's admission that he and Hosack "had an understanding" to tell one another exactly what they believed concerning the subject of unionism.

(4)

Allegation: It is alleged that Hosack threatened employees with adverse action, plant relocation or closure if they selected the Union (GC Exhibit 1(n), paragraph 5(c)).

Facts: Around April 4, 1979, Bennett happened to mention to three fellow employees that he'd purchased a motorcycle. Hosack was present, and stated words to the effect that he didn't understand how some people could undertake financial obligations, such as would be involved in purchasing a motorcycle, when they didn't know where their income was coming from.

Conclusion: For the reasons just stated, I have determined that Bennett's testimony must be credited. And, it needs much imagination to view Hosack's words as anything other than a thinly veiled threat to the economic welfare of Bennett, particularly when it is recalled that Bennett was soon thereafter illegally discharged.

(5)

Allegation: It is alleged that Calendar in mid-March and on March 27, 1979 threatened employees with plant closure if they selected the Union (GC Exhibit 1(i), paragraph 5(a)).

Facts: Thiellen testified that on Monday, March 26, 1979 around 6:05, near the supervisor's desk, and with employees Hicks and Stick within earshot, Calendar came up to him and said he had heard through employee Haverkamp that Thiellen had been saying that it was illegal for a plant to close because employees selected a union. Thiellen responded that it was illegal for a plant to close because of a union

election and that it was also illegal to threaten to do so. Thiellen testified that Calendar loudly rejoined, "This plant can close at any time for any reason. You don't know what you are talking about." This led them to begin arguing as to which knew more about the law governing such conduct. So, on the following day Thiellen brought a copy of a judicial opinion to work with him. He spoke to Calendar around noon near the black line section, with employee Schwarz nearby. According to Thiellen, upon being shown the opinion, Calendar stated that he had no quarrel with what it said, but that he was bothered by the fact that the Japanese could take over the entire Lincoln, Nebraska operation merely by using two unused production lines already in existence in Japan. When Schwarz asked why they didn't, Calendar said that the Lincoln plant was an experiment.

Conclusion: As previously noted, I found Thiellen's testimony to be quite credible. Thus I have no hesitance in finding and concluding that the facts occurred as he testified in the face of the Respondent's failure to call Calendar in an attempt to refute Thiellen's story. And, while I can appreciate the sense of "provocation" perhaps felt by certain of the Respondent's supervisors, there remains no excuse for any supervisor uttering so bald a threat as that contained in Calendar's statement that, "This plant can close at any time for any reason," or in Calendar's allusions to the ability of the Respondent to easily transfer the plant's work to Japan. Obviously, an employer may under certain circumstances, close a plant, or relocate a production facility, but the breadth of Calendar's statements detracts from any

attempt to color his words as lawful comments about lawful actions.

(6)

Allegation: It is alleged that on or about March 27, 1979, Don Van De Walker threatened employees with plant closure if they selected the Union to represent them (GC Exhibit 1(i), paragraph 5(a)).

Facts: Employee Schofield testified that on or about March 23, 1979, while in the plant's lunchroom around 9:30 a.m., accompanied by employees Harm, Esch and Keys, he started a conversation with Van De Walker by inquiring whether he'd advised employee Strough that if the Union got in the plant would move or close. Schofield testified that Van De Walker replied by saying that in his opinion it would. Harm then protested that a foreman had no right to tell employees the plant would close or move. At that, supervisor Green* rejoined that if they didn't like it there they could go to Russia.

Schofield's testimony about this incident was substantially corroborated by employee Harm's testimony. Employee Esch, though called as a witness by the General Counsel, was not asked about this conversation. Employee Keys, called as a witness by the Union, was not asked about this conversation.

Van De Walker testified that he'd responded to a question from Schofield about whether he'd threatened Strough by denying that he'd done so. He recalled that Harm and Green then loudly disputed a

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* Van De Walker had been seated with Supervisors Green, Janssen, Goodwin and Rable at the time that Schofield, Harm and others joined them, and Schofield put his question to Van De Walker.

point of law before the entire group dispersed.

Conclusion: Van De Walker exceeded the bounds of lawful commentary when he stated, without qualification other than the label of opinion, that the plant would move or close if the Union got in. Green's comment that employees who didn't like it, apparently referring to the Respondent's opposition to the employees' statutorily protected free choice, could go to Russia certainly did nothing but reinforce the coercive effect of Van De Walker's words, which I find to have violated Section 8(a)(1) of the Act.

(7)

Allegation: It is alleged that on or about April 17 Hosack promised benefits to employees in return for the employees dropping their support for the Union (GC Exhibit 1(n), paragraph 5(b)).

Facts: I have not found evidence to support this allegation. And neither the General Counsel nor any other party addressed it in their brief.

Conclusion: I therefore find and conclude that this allegation of the complaint should be dismissed as without merit.

(8)

Allegation: It is alleged that on or about April 10 Dennis Butt told employees that the Union was responsible for making bomb threats (GC Exhibit 1(n), paragraph 5(d)).

Facts: Employee Berg testified that he spoke to Butt on or about April 10. This conversation began near his work station and came about at Berg's request. Berg made his request to be allowed to speak

to Butt as a result of a notice posted upon the plant's bulletin boards. The notice recited that there had been two bomb threats at the plant, that such threats had caused the Respondent to suspend all activity in the plant and thereby waste time. In fact, on one occasion the plant had in fact been evacuated. The notice stated:

> I do not know whether the time of these threats is related to the upcoming election, but I do know that there is no past record of any such incident here at Kawasaki. I know also that the UAW has a record of occasionally inspiring certain individuals to take actions which are not always in the best interest of everyone involved. And I know lastly that the silence you hear upon returning to the plant after a bomb threat will become a permanent silence if we are to allow production to be continually interrupted.

The notice went on to state Butt's intention not to allow such threats to go unchallenged, and to seek the aid of employees in exposing whoever was responsible for the threats in order to insure that production continued without interruption.

Upon seeing such a notice, Berg asked his general foreman to arrange a meeting with Butt. This was done and at about 2:45 in the afternoon Butt and Summers came to Berg's work station. Butt and Berg sat down to talk. Berg stated that he felt this was a cheap shot and a low blow. He told Butt that he realized that the notice did not say specifically that the UAW was responsible but that he continued to feel that it implied that. Butt and Berg disagreed as to the meaning of the notice, even following a re-examination of it. Berg testified that during this re-

examination Butt told him "I do know that the UAW through past experience has inspired people to do things that they would not ordinarily so, such as pushing baby carriages with babies in front of moving cars to stop them from going into a plant or something." Berg stated that Butt then went on to say that he did not understand how anybody could gain the impression that he was trying to blame the UAW for the bomb threat. At one point, Berg turned and asked the employees who were gathered around him and Butt whether they interpreted the notice as he did. Employee Kuntz stepped forward and responded affirmatively. At that, Berg told Butt that that was all he had to say, thanked him for his time, and left.

Employee Kuntz also testified about this matter on behalf of the General Counsel. Her testimony however was quite vague and generalized, and it was quite apparent also that she simply had not been present to witness the events leading up to Berg's question which caused her to step forward and affirm that she believed that the notice amounted to a form of accusation. Nevertheless, I do believe that her testimony is corroborative of Berg's testimony to the extent that it indicates that she did respond affirmatively to the question he put to the gathered employees.

Butt, on the other hand, was not called by the Respondent to testify on this or other matters. Nor was Summers asked about this matter by the Respondent, though it was unclear just how much of this may have been overheard by Summers.

Conclusion: The fact that the notice was posted

is not in dispute. Nor is the language thereof.[7]

Nor is the testimony of Berg seriously contested, in the sense that any controverting testimony has been presented. For Butt was not called as a witness and Summers, though called, was not asked about this point. Thus, I credit Berg's testimony with respect to his conversation with Butt.

I confess that I am at a loss to understand precisely what the General Counsel is urging as a violation, that is whether he is urging that the language of the notice itself is violative or whether he is urging that the conversation with Butt contained some coercive content. In this latter respect, I note that considerable time was spent at the trial, including this very allegation, attempting to find out what evidence related to which allegation in the various complaints. On balance, from what the General Counsel had to say at the trial as well as what he stated in his brief, I am inclined to believe that he seeks a

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[7] The notice which the General Counsel originally placed in evidence (GC Exhibit 9) differs somewhat from that which was eventually demonstrated to be a true copy of the notice which was placed on the bulletin board (GC Exhibit 10). While the main body of the two notices is identical, I believed it improper for the General Counsel to have knowingly offered into evidence any exhibit differing from the true original. This is especially so where the offer is not accompanied by any explanation. Thus, while at this point the discrepancy between the exhibit offered and that which was, in fact, the true copy of the original varies only in collateral respects, I think it evident that the determination as to whether or not such a variance is sufficiently important to deprive opposing counsel of cross-examination rights must not be left to the counsel for any party. Instead, I believe that that question must properly be presented to the presiding administrative law judge. For that reason, I adhere to my view expressed, during the trial, that such conduct by the General Counsel impinges upon the hearing process.

finding of a violation based solely upon what was stated in the notice Butt posted, and not upon what Butt had to say while conversing with Berg.[4]

And, again on balance, I find that the Respondent's words reasonably conveyed the thought that the Union was responsible for making bomb threats, and that further disruptions of work would lead to plant closure or transfer of work from the plant to Japan or elsewhere. However, no evidence of link-

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[4] However, I am unsure about that latter point. Among the reasons for my uncertainty I note once more that the General Counsel filed several complaints with numerous allegations in them, that the evidence in this case was frequently difficult to tie up to the specific allegations being considered, and that the General Counsel was urged by me to issue a consolidated document so that every issue could be addressed at once, but he failed to heed the urging I gave him, and the trial itself was quite lengthy. Thus, the possibility for error clearly exists. In this latter connection, I have read the case cited by the General Counsel, *Medline Industries, Inc.*, 233 NLRB 627. I have failed to note any reference to either notices or bomb threats, the points for which I believe it was cited.

However, I must confess my inability to state this with certainty because of the brief filed by General Counsel which states at its conclusion: "Counsel for the General Counsel does not abandon any theory or complaint allegation simply because it has not been specifically argued herein." The General Counsel's theory may be that I have a duty to search the record and find whatever violations may be there, regardless of whether they were argued or relied upon at the trial, or even urged in the brief. I would agree to some extent, but not to the extent apparently desired here. This is especially so in a case where the trial was drawn out from August 1979 through the end of January 1980, where the General Counsel had opportunities to amend his pleadings to conform to the evidence (since counsel had copies of much of the transcript literally months before the trial was over) and the General Counsel failed to take advantage of those opportunities. Thus, when the General Counsel moved to conform the evidence to the pleadings, I did not hesitate to deny the motion, particularly in light of the fact that no specifics were pointed out.

age between such threats and the Union has ever been advanced.

Overwrought partisans of unions and employers can and often do use the technology of telephones to hide some overzealous, cowardly and dangerous act, such as making a bomb threat. But this can scarcely privilege an employer's threat to close or relocate its facility, at a time shortly preceding a representation election, for, proceeding solely upon conjecture and speculation, as the Respondent was doing, one might just as easily conclude that the alleged "threats" were fabricated by the Respondent in order to form a basis for refusing to deal with the Union. Obviously, neither form of speculation is warranted.

Nor does my finding and conclusion lead to the view that bomb threats must be suffered in silence. To the contrary, I would have no difficulty in dismissing this allegation had the unwarranted linkage of the threat to the Union not beem made, or if the threat of plant closure not been woven into the Respondent's notice.

Accordingly, I find and conclude that the Respondent violated Section 8(a)(1) of the Act as alleged.

Allegation: It is alleged that Van De Walker threatened employees on or about April 11 with plant closure if they selected the Union (GC Exhibit 1(i), paragraph 5(e)).

Facts: Following a mass meeting of day shift employees conducted by Butt on approximately April 11, employees Schofield and Kalmbrunn testified as to statements made to them by Van De Walker. According to Schofield, he saw Van De Walker leave a conversation with supervisor Rob-

bins and employee Kalmbrunn and come to his work station. When Van De Walker got there he told Schofield that he had heard that Schofield was spreading rumors through the plant about him, Van De Walker. Schofield responded that the only thing he had "spread" was that Van De Walker had told him that he (Van De Walker) had told employee Strough that the plant would move or close.

As Kalmbrunn remembered it, Van De Walker spoke to her after his meeting and then went over to Schofield. She followed him. She recalled Van De Walker telling Schofield that he had told employee Strough that the plant could move or close but that that was just his own opinion. According to Kalmbrunn, when Schofield responded, "I understand," Van De Walker reiterated that he had just come over to make sure that Schofield understood that what he had said to Strough was just his own opinion.

Van De Walker also recalled the incident. However, he stated that this occurred as a result of a request he had had from his superior to reassure Kalmbrunn that the plant would not be moved or closed and that he hadn't threatened anyone. As a consequence of this request, he approached her at work and told her that he wanted to assure her that he had never threatened anyone with closure of the plant.

As Van De Walker recalled it, Schofield was working to the right of Kalmbrunn and he heard him mutter something. So he walked over to Schofield and said that he (Van De Walker) was a known quantity and that Schofield must know that he was not the type to threaten anyone. However, he did

recall that Schofield stated that what he had been stating was his own opinion, at which point he recalled that he thanked Schofield and then walked away.

Conclusion: Schofield impressed me as a witness trying to be truthful. He had obvious difficulty in accurately relating the date of the conversation he had with Van De Walker, but not in a manner which would detract from his overall credibility. Kalmbrunn gave her testimony with composure, directness and apparent accuracy. Supervisor Van De Walker also appeared to be a truthful and believable witness; he did however exhibit a tendency to become defensive and to attempt to anticipate and parry attacks upon his testimony before they had even developed.

Thus, while the issue is close, I have determined to credit the testimony of Schofield and Kalmbrunn over that of Van De Walker in this instance, for the reasons set forth above. This leads me inevitably to conclude that Van De Walker had, indeed, uttered a threat of plant closure to employee Strough, and then repeated the essence of the threat to employees Schofield and Kalmbrunn. I find that this conduct violated Section 8(a)(1) of the Act.

(10)

Allegation: It is alleged that sometime during the week prior to April 11, supervisor Robbins threatened employees with closure of the plant if they selected the Union (GC Exhibit 1(n), paragraph 5(e)).

Facts: Kalmbrunn testified that in early April her supervisor, Robbins, spoke to her. Kalmbrunn

admitted that she brought up the subject and indicated her indecision about whether to be in favor of the Union or be against the Union. However, Kalmbrunn insisted that she did not ask Robbins his own opinion of unions and that Robbins simply went on and told her what he thought on his own volition. She recalled that he had told her that he once belonged to a union and felt that many times unions do more harm than good. She was specific in her recollection that he told her that the plant could close or that it might be moved if the Union were to be voted in.

Conclusion: As previously noted, Kalmbrunn's testimony has been found to be credible. Supervisor Robbins did not testify. Thus, I find that the conversation occurred as testified to by Kalmbrunn, and Robbins' gratuitous commentary was unprivileged threats of retaliation in violation of Section 8(a)(1) of the Act.

(11)

Allegation: It is alleged that on or about March 27 supervisor Whisenhunt threatened employees with plant closure if the employees selected the Union as their collective-bargaining representative (GC Exhibit 1(i), paragraph 5(a)).

Facts: Employee Goebel testified that on March 23, shortly after beginning work in the morning, supervisor Whisenhunt directed the employees in his department to go upstairs to the quality control conference room. Goebel stated that Whisenhunt talked to them, first qualifying his statements by saying that it was just his own personal opinion that he was expressing, that it would be possible that

Kawasaki would close their doors. Whisenhunt told the assembled employees that they did not have to listen to him and that his statements were his personal opinion and not the opinions of the management of Kawasaki.

Employee Harsh testified about attending the second meeting. However, according to Harsh, Whisenhunt started the meeting by stating that he firmly believed that if the UAW got in the plant's doors would be closed and the plant would be moved to Japan. He followed up by saying that Kawasaki could afford to move to Japan and questioning whether the individual employees could similarly afford it. However on cross-examination, she qualified her testimony by stating that he could have simply stated that he was telling the assembly his own beliefs and opinions.

Conclusion: This allegation stands unrebutted since supervisor Whisenhunt was not called as a witness by the Respondent. Nevertheless, in view of the inconsistency between the testimony of Goebel and Harsh, I have substantial questions with respect to their credibility. Goebel possessed a rather poor recall of facts, but he did seem to recall with some certainty the disclaimers entered by Whisenhunt. Harsh, on the other hand, seemed to exhibit partisanship in favor of the Union while testifying. That she was careless with words is demonstrated by the manner in which she was forced to modify her testimony while being cross-examined.

In light of the vagueness of the testimony of Goebel and my reluctance to credit Harsh, I have determined, despite the absence of rebutting testimony

by Whisenhunt, to reject the testimony of Goebel and Harsh on this point. Accordingly, this allegation of the complaint should be dismissed.

(12)

Allegation: It is alleged that on at least three occasions in late March and early April with the exact dates being unknown, Butt promised benefits to the Respondent's employees in order to dissuade them from continuing their support for or activities on behalf of the Union (GC Exhibit 1(n), paragraph 5(b)).

Facts: During the period proceding this election, various agents of the Respondent conducted numerous meetings with employees. As already noted, various supervisors and foremen conducted meetings within their own departments in addition to individual one-on-one discussions with employees. On still other occasions, employees were brought together in larger groups so that higher officials within the company could speak to them or even make slide presentations to them. Here, of course, the allegation relates to only one official of the company, Dennis Butt.

Butt was introduced to the employees at a meeting called for all first shift employees and conducted in the plant's front wheel assembly area on approximately March 28. At that time, a visit official from Japan, a Mr. Yamada, introduced Butt as the plant's new manager. My sense of this meeting, as well as others similar to it, conducted in order to make sure that he was introduced to all of the plant's employees, is that Butt stepped up in front of each assembly, told the employees that he was anxious to do well in his new position, and exhorted

employees to trust him and other Kawasaki officials, giving them fair opportunity to correct whatever mistakes had been made in the past.

And it is in connection with this reference to past mistakes that the difficulty asserts itself. For Butt told employees that he was aware that they were in th midst of a union election, but then went on to speak of the Respondent's past mistakes (presumably speaking particularly of his predecessor in his job) and to state that those mistakes would eventually be rectified. It also seems clear that he did not state specifically how those mistakes would be rectified except in one instance.

According to a number of employees who testified in this case, Butt, during the course of his talk to employees, held up for them to see a notice which had been posted in the plant by his predecessor in office. That notice had previously advised employees that due to President Carter's wage and price guidelines, employees would not receive their anticipated annual wage increase and would, instead, be limited to merit increases. In this regard, Butt proceeded to tell the employees that notice which he was holding up was one of the mistakes that he was referring to. With some apparent flair for the dramatic, Butt proceeded to tear up the notice in front of the employees, throw it into the assembled crowd before him, and declare that to be "what he thought of" the memo. Butt's presentation seemed uniformly to contain a disclaimer to the effect that he could not make employees any promises, but then, inconsistently, to assure them that things were going to change.

Conclusion: Butt's dramatic linkage of past mis-

takes to the repudiation of a policy which had the effect of preventing increases in wages can only be viewed as a veiled promise to increase wages, if only employees would "give him a chance." I find that the "chance" referred to was synonymous with rejection of the Union. As such, Butt conditioned the repudiation of a policy preventing employees from receiving wage increases upon the employees' rejection of the Union. I find and conclude that Butt thereby violated Section 8(a)(1) of the Act.

VI. Case No. 17-RC-8473

The Union's objections to the election closely parallel the unfair labor practice issues raised by the consolidated complaints herein. Pursuant to findings heretofore made, I shall sustain objections 2, 3, 8 and 12 in view of my finding that during the critical pre-election period the Respondent, through its supervisors and agents, violated Section 8(a)(1) by promising benefits, by threats of plant closure, by threats to impose more arduous or onerous work duties, by threats to withhold benefits such as labor grades or job reviews or other unspecified benefits, by threatening that the employees' selection of a union would amount to no more than a futility, by threatening employees with plant closure or other adverse action including plant relocation if the Union were selected, by advising employees that the Union was responsible for making bomb threats at the plant, and by actually discharging a union supporter as a reprisal for having engaged in union activities. In my opinion, these unfair labor practices disrupted conditions enabling a free and uncoerced choice in the election.

On the other hand, I shall overrule objection 4 in-

asmuch as the evidence fails to support the allegation of interrogation, even insofar as it indicates that employees were forced to wear insignia or reveal their pro-union sentiments by their failure to do so. I shall overrule so much of objection 8 as pertains to the threat to bargain from scratch in the event the Union won the election, inasmuch as the evidence fails to convince me that such threats were made in a manner having a substantial impact upon the election. Likewise, I shall overrule objection 14, inasmuch as I do not believe that the unfair labor practices mentioned above, while serious and pervasive, amount to a "campaign of intimidation and fear" by threats of violence, strikes, or loss of jobs and customers. Similarly, I shall overrule objection 15 inasmuch as I believe that such a threat as was made by shutting down the plant's operations and advising employees that they should listen to the "sound of silence" created by the advent of the Union, with the implicit threat that the plant would become permanently silent is, in fact, embodied within objection 3 and will be remedied by my sustaining that objection.[9]

VII. The Union's Request for a Bargaining Order

In considering the proper remedy in this case, the important question of whether or not to order that the Respondent bargain collectively with the Union is presented by the Union's motion that I issue such an order. The Union argues that the unfair labor practices committed by the Respondent herein are

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[9] No factual discussion of this threat is deemed necessary, as the Charging Party's Exhibit 1 demonstrates that Butt did, in fact, have the plant shut down briefly.

aggravated in nature, and have pervaded the election process to the extent that a fair election is unlikely to be held in the future.

Of course, such a bargaining requirement may be imposed under the authority of *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969). In that case, the Supreme Court plainly emphasized the law of this land to be that an employer which deliberately clogs the machinery of the statutory federal labor elections system cannot be heard to complain if its employees' representation desires are determined by less reliable means than a secret ballot election, such as their signed bargaining authorization credentials. And it does seem less than fair that an employer may thwart employees' free choice by engaging in unlawful conduct well calculated to coerce and intimidate, thereby undermining and eroding the Union's base for support. Additionally, the Union's base for support at the plant is eroded by the mere passage of time. In this case, the passage of time since the petition was filed herein now exceeds 2 years.

Of course in determining whether or not an employer's activities have so poisoned the atmosphere that the likelihood of a free and uncoerced rerun election may be held, one must take into account the seriousness of an employer's unfair labor practices. And it must be pointed out that the discharge of union adherents is among the most serious of unfair labor practices. Such unfair labor practices have been determined to form a valid basis for imposing a bargaining obligation. *N.L.R.B. v. Sitton Tank Company*, 467 F.2d 1371, 1372 (C.A. 8, 1972); *A.J. Krajewski Mfg. Co.*, 180 NLRB 1071 (1970). I have

found that the employer committed such activities here.

However, it must still be noted that a precondition to a *Gissel* bargaining order is that the union held a valid "card" majority in the bargaining unit. United Dairy Farmer's Cooperative, 242 NLRB No. 179, 101 LRRM 1278 (1979).[10]

Clearly, no such showing has been made in this case. Indeed, no such showing has even been attempted. While perhaps the dual eroding effects of the passage of time and the employer's unfair labor practices have, therefore, resulted in successfully thwarting the employees' legitimate desires for collective representation I have no alternative, in my opinion, but to deny the requested relief.

VIII. The Discharge of Dan Bennett

(1) General Statement

Dan Bennett was initially employed by the Respondent on February 7, 1977 and continued working there until April 10, 1979, at which time he was fired. He worked at several jobs while there. He began his last job for the Respondent in October 1978 when

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[10] I am mindful that the U.S. Court of Appeals for the Third Circuit recently remanded this case, after affirming the Board's findings of unfair labor practices, for reconsideration of the question of whether or not a bargaining order may be issued without a demonstration of majority support for the union. *United Dairy Farmers Cooperative Association v. N.L.R.B.*, ____ F.2d ____, 105 LRRM 3034 (C.A. 3, 1980).

However, in addition to significant differences between that case and this, I have no warrant for failing to follow the Board's precedent, even in cases where a true conflict appears between the Board and one or more Courts of Appeal. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963); *Peavey Company*, 249 NLRB No. 210 (1980).

he transferred to the maintenance department, under the direction of Max Hosack, working the 4:30 p.m. to 1:30 a.m. shift. Bennett was regarded as a good employee, and received three pay raises in the year or so preceding the discharge.

He was an adherent of the Union during both preelection campaigns conducted in 1978 and 1979. He signed an authorization card on behalf of the Union and wore both T-shirts and buttons asserting his allegiance to the Union. Additionally, in the campaign preceding the second election, he talked to approximately 50 fellow workers on behalf of the Union and passed out buttons for others to wear. He served as a member of the Union's organizing committee, and the button which he wore so identified him.

(2) The Discharge

On April 9, 1979, Hosack directed Bennett to do the job of preventive maintenance for a period of 1 week, as a fill-in for a vacationing fellow employee. This job required, so Bennett testified, that each machine in the plant be lubricated and inspected according to a monthly schedule, but with the work essentially being done at the employee's own pace, without close supervision.

Bennett began his last night of work at the Respondent at 5:00 p.m. He worked without incident until around 1:00 a.m. the next morning. At that time he pushed his equipment cart over to an area nearby the next two jobs on his list. When he got there he noted a Readers Digest magazine laying there. So he sat down on some aluminum rafters stored nearby and began to read "Laughter-The Best Medicine." Behind him was the degreaser,

and he was off in a corner of the plant. Bennett testified that he was not hiding or making any attempt to hide." He was about 10 to 12 feet from an aisleway, from which he could be clearly seen.

Bennett says he sat there only a short time, just long enough to read half a page, when Hosack walked up. Bennett said, jokingly, "You caught me sitting down." Hosack agreed and told him to punch his timecard out for the night. Bennett asked why and Hosack responded, "You are not supposed to be sitting down on the job." Bennett rejoined that he'd been working hard that night and was tired, so that he'd sat down for a rest while he read one page. Hosack repeated his direction to punch out and told Bennett he'd ask the personnel department to suspend Bennett for 3 days. Bennett said that he'd done no more than was common practice, and said that preventive maintenance was done at the employee's own pace so long as the scheduled goals of maintenance were met. Hosack replied that he'd never heard of anyone sitting down to read books. Their argument continued until Hosack told Bennett he was lucky not to be fired on the spot. Bennett was told to come back the next day after first calling Hosack. Bennett urged Hosack to check the records to see how much maintenance Bennett had performed that night, but Hosack refused.

Around 10:00 a.m., Hosack phoned Bennett and told him to report to Summers' office at 4:00 p.m.

" Instead he vehemently asserted that such "breaks" were routine for maintenance employees, that many others engaged in like conduct without adverse consequences, even though some might do so for lengthy periods or, even in one case, for long enough to read a complete novel.

When Bennett arrived there, he was met by Hosack, Summers and Dave Fairbanks, Hosack's supervisor. Summers said that he'd heard Hosack's story and that he wanted to also hear Bennett's. Bennett exclaimed that he didn't understand what he'd done that was wrong, that he'd worked hard and that the records would bear him out. He also pointed out that he was a "really good employee," and had never been warned or reprimanded. Hosack interrupted to correct that he'd been warned to wear his safety glasses. Bennett agreed, but argued that had never been "a problem." Hosack also noted he'd been caught on a forklift truck. Bennett again agreed that he'd been caught, but noted that nothing had ever been said. He went on to tell them what happened the night before, and to reiterate that he had an excellent work record, telling them that he thought a 3 day suspension was totally unfair.

Bennett was then asked to wait outside the office. He did so for about 30 minutes. He was then called back and Summers told him he was being terminated because Hosack could no longer trust him. Bennett argued that he was trustworthy, and that, even if he weren't, the Respondent's own records would show that he worked hard and well. He asked to speak to Summers in private.[12] When the others had left he told Summers that Hosack had been a problem, not only for him but for others as well. He reiterated his good record for 3 years of work and asked to be reassigned anywhere in the plant. Summers refused, so Bennett gave up and left the plant, not to return.

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[12] At one point during the interview Bennett asserted that if it were not for the upcoming union election such drastic discipline would not have been considered. Summers responded that the Union had nothing to do with the action taken.

(3) The Defense

The Respondent urges that, regardless of his reason, Bennett's reading break was unauthorized, and of a sort which he knew to be frowned upon by his supervisor. Additionally, the Respondent contends that Bennett's break was substantially longer in duration than depicted in his testimony, that it makes no sense to suppose that Bennett's union activities should have so suddenly proven unbearably repugnant to his superiors, and that neither the severity of the discipline imposed nor the failure or refusal of the Respondent to carefully investigate Bennett's alleged wrongdoing are of any legitimate concern to me in this decision.

(4) Bennett's Discharge Was Unlawful

I conclude that the General Counsel has made out a *prima facie* showing sufficient to support the evidence that the Respondent discharged Bennett because of his union activity.[13] Bennett's sympathies and activities in support of the Union had been open and were admittedly well-known to the Respondent. The timing of the discharge cannot be ignored simply because the Respondent had been aware of his advocacy of the Union for a long time; instead, as has been shown by its activities in connection with the election campaign in the March-April 1979 time frame, the Respondent harbored a virulent hostility toward unionization. That hostility manifested itself with illegal threats that the plant would close, that it would move, that employees' jobs would be transferred to Japan, by threats to take benefits away

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[13] See *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

from employees, by promising benefits to employees if they rejected unionism, and by granting benefits in order to induce them to do so.

Thus, it begs the question for the Respondent to simply ask whether Bennett had engaged in misconduct, or to note that he might have properly been subjected to some form of discipline for having sat down to read a page from the Reader's Digest's section of "Laughter-The Best Medicine." Instead the proper question is whether or not the evidence demonstrates that were it not for his union activities he would have suffered the same fate, i.e. economic capital punishment. I find, on balance, that he would not and that his discharge was, therefore, discriminatory in nature.

The decision to fire Bennett was made by Summers following consultation with Hosack, Fairbanks and Butt. His decision, so he testified, was predicated solely upon Bennett's misconduct in sitting down to read a magazine the night before. Summers testified that Bennett's duties required that he perform them throughout the plant, and that he be alone, relatively "unsupervised," when doing so. But while Summers conceded that there were machines in the area where Bennett was "caught" by Hosack, he hedged his answer as to whether or not Bennett had, in fact, been performing maintenance duties upon them. In this respect, he lacked credibility, as he did when he testified that Bennett had told him, while making a plea for his job, that he'd intended to simply read a magazine for the remainder of his work shift when he was "caught" by Hosack, another 30 or 40 minutes.

In evaluating allegations of discriminatory con-

duct, the pivotal factor is motive. *NLRB v. Lipman Brothers, Inc., et al.*, 355 F.2d 15, 20 (C.A. 1, 1966). For, while it is true that an employer may discharge for a good reason, a bad reason, or no reason at all, it is also true that an employer may not discharge when the real motivating factor is to do what Section 8(a)(3) forbids. *Great Plains Beef Company*, 241 NLRB No. 150 (1979). And, further, while I must be careful not to substitute my own subjective judgment of what I would have done in the Respondent's position, *Grand Auto Inc. d/b/a Super Tire Stores*, 236 NLRB 877, footnote 1 (1978), and while I must acknowledge that simply because discipline may seem extreme it does not follow that the assigned reason for discharge was pretextual, *J. Ray McDermott & Co., Inc.*, 233 NLRB 946, 952 (1977), neither does it follow that simply because valid grounds for discipline may have existed that the termination was lawful. *N.L.R.B. v. Texas Independent Oil Company, Inc.*, 232 F.2d 447, 450 (C.A. 9, 1956). For an employer's motives may be mixed, and the effect is the same as if the illegal reason were the only operative reason. *Construction, Production & Maintenance Laborers' Union Local No. 383, etc. (William Pulice Concrete Construction)*, 236 NLRB 125 (1978); *N.L.R.B. v. Aver Lar Sanitarium*, 436 F.2d 45, 50 (CA. 9, 1970), and cases cited therein. An employer may not resort to even a valid reason for discipline as a means of building a case against an employee due to his union activities. *United Aircraft Corporation v. N.L.R.B.*, 440 F.2d 85, 92 (C.A. 2, 1971), or as a result of a campaign of "watchfully waiting for . . . . union enthusiasts to give the . . . slightest reason or pretext to get rid of them because of their union activities." *Lipman Brothers, Inc., supra*, 355 F.2d at 21.

Both the Board and the courts have held that "if the stated motive for a discharge is found to be false, it can be inferred that the motive is an unlawful one which the respondent desires to conceal, at least where the surrounding facts tend to reinforce that inference." *First National Bank of Pueblo*, 240 NLRB 184 (1979); *Shattuck Denn Mining Corporation v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966).

Moreover, if a supervisor, upon whose report an action is taken, was discriminatorily motivated in making such a report, there is no question but that the report must itself be considered the cause of the action, and that any resulting action must be regarded as discriminatory. *Bechtel Corporation*, 195 NLRB 1013, 1020 (1972). Thus, Fairbanks' testimony[4] that Hosack had assured Summers that no prior similar incidents were known cannot shield the Respondent.

In this case it appears that the sudden decline in the level of tolerance shown by Hosack, and the "untrustworthiness" shown by Bennett coincided with the peaking of both Bennett's union activities and the Employer's anti-union campaign. Such circumstances give rise to an inference that an employer's stated reason for discipline was false. See, for example, *All Brite Window Cleaning and Maintenance Services, Inc.*, 235 NLRB 596, 602 (1977); *The Youngstown Osteopathic Hospital Assoc.*, 224 NLRB 574 (1976); *Holiday Inn of America of San Bernardino*, 212 NLRB 280 (1974), enforced as modified 512 F.2d

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[4] Fairbanks' testimony lacked credibility. Despite repeated attempts to have him cease testifying in vague and conclusionary terms, he persisted. I am unable to believe his testimony on any point short of an admission.

1171 (C.A. 9, 1975); *Shasta Fiberglass Inc.*, 202 NLRB 341 (1973). And while, as noted earlier, I am not free to substitute my judgment for that of the Respondent, neither am I free to blind myself to the inferences which logically arise during an inquiry into the Respondent's motivation where the Respondent's actions seem atypical.

The fact that the Employer failed to heed Bennett's repeated pleas to simply look at his record to see how much he had done detracts from the Respondent's credibility in its assertion of a valid reason for discharge. Compare *Tama Meat Packing Co.*, 230 NLRB 116 (1977).

This conclusion seems doubly reasonable where a seasoned and good employee, such as Bennett, was summarily discharged, thereby apparently causing the Respondent to face the prospect of replacing him with someone unseasoned; in this connection I note that Bennett was already a replacement for a vacationing employee. Compare *N.L.R.B. v. Davidson Rubber Co.*, 305 F.2d 166, 169 (C.A. 1, 1962); *N.L.R.B. v. I.A.T.S.E. (Film Editors)*, 303 F.2d 513, 519 (C.A. 9, 1962), cert. denied 371 U.S. 826 (1962).

In sum, Bennett was apparently a vocal and active supporter of the Union. The Respondent was adamantly opposed to unionization and an election was soon to be held. When Bennett engaged in activity which arguably constituted misconduct, but which was clearly of a rather minor nature, similar to that which had been countenanced on many occasions previously,[15] he was summarily discharged while the

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[15] Bennett's testimony to this effect was credibly delivered. It is also noted that Hosack was not called to testify, to deny Bennett's testimony. And, as previously noted, I have not found

Respondent adamantly refused to consider or review its own records of how much work he had produced during the time in question."* I am persuaded that, on balance, had Bennett not been the strong union activist he was, and had the election not been imminent, Hosack's level of intolerance would not have been so substantially increased and Bennett would simply have been told to return to work, either when Hosack first saw him or as soon as he had completed his rest, and that, if any discipline at all had been meted out, it would have been no more than a mild rebuke." For while there is no quarreling with the Respondent's position that it must be able to maintain high standards of productivity, neither can it be gainsaid that the Respondent may not enforce such standards only against those who happen to be leading or ardent supporters of the Union.

Hosack's medical condition sufficient to overcome credible evidence.

* It is not even clear that what Bennett did would amount to "misconduct"; for I am convinced by the evidence that maintenance workers must, by the very nature of their jobs, work at a pace motivated in large part by their self-discipline, which will satisfy an employer if the results demonstrate that the machinery has, in fact, been serviced properly. I do not believe that the Respondent could credibly contend that it requires each and every employee, including those working upon periodic maintenance activities, to behave in such a "nose to the grindstone" fashion that an employee may not legitimately take a short rest-break.

" For example, employee Slossen credibly testified, corroborating Bennett, that he and others were similarly "caught" by Hosack only days before Bennett was "caught." Yet Hosack merely caused them to return to work. There is no explanation readily apparent for the different level of tolerance extended to them and Bennett other than Bennett's leading role in the efforts to unionize.

Accordingly, I find and conclude that the Respondent's evidence is not sufficient to furnish an adequate defense to the General Counsel's *prima facie* case. Summers' testimony regarding the discharge of another maintenance employee, Sorrell, demonstrated the comparatively precipitous nature of the Respondent's action in firing Bennett, who was accused of no more than an offense against property. Sorrell, on the other hand, was accused of the much more serious conduct of threatening a supervisor. The General Counsel's documentary evidence, drawn from the Respondent's own files, shows that Sorrell was issued a series of written warnings, growing out of a series of incidents over a period of several months, some of which had the potential for violence.

From all that appears the Respondent had and used at least a rough form of progressive discipline when dealing with Sorrell, who was evidently not known as a union activist. Bennett, on the other hand, was quickly fired for a lesser offense, previously countenanced, despite Bennett's good record and in the face of his unavailing efforts to persuade the Respondent's officials to even look at its own records which Bennett contended would demonstrate that he'd been working diligently.

The disparate treatment thus demonstrated seems to have little possibility of explanation other than that contended by the General Counsel and the Charging Party, i.e. that Bennett was subjected to summary, harsh discipline because of a desire by the Respondent to rid itself of his union activism shortly before the election.

Accordingly, I find and conclude that Respondent

illegally discharged Bennett as alleged in violation of Section 8(a)(3) and (1) of the Act. It seems clear that, at the least, Bennett's break cannot be correctly characterized as unauthorized. Nor is it clear just how Bennett's "trustworthiness" could be legitimately impugned based on the evidence at hand. It seems more likely that Hosack's extreme reaction to Bennett's alleged misconduct was predicated upon his sense of "how little" Bennett cared for the company, as demonstrated by Bennett's wearing of a prounion badge or otherwise demonstrating a leadership capacity on behalf of the Union. Nor should Hosack's scarcely veiled warning, days before, that Bennett had been foolish to buy a motorcycle since he had no assurance of continued employment, be disregarded when considering Hosack's motivation. I conclude, therefore, that Hosack, and others, illegally, seized upon this incident in an attempt to manufacture "just cause" to discharge Bennett, in violation of Section 8(a)(1) and (3) of the Act.

IX. The Discharge of Connie Clare

(1) General Statement

Connie Clare began working for the Respondent in April 1977, eventually being assigned to a series of departments and jobs. She received a written warning in late 1977 or early 1978, calling upon her to improve her attendance, increase her production, and be more consistent in maintaining high standards of quality. Her job review was postponed for 30 days in order to give her an opportunity to improve her performance. She was specifically warned that her production should be improved by spending more time working and less in the bathroom or talking. Ultimately, however, she suc-

ceeded in earning a work review and a merit wage increase (although the Respondent contends that such an increase bore little or no relationship to true merit).

As the Union's initial organizational effort began, Clare became an open advocate of the Union. She joined the organizing committee,[8] signed an authorization card, and passed out other materials from the Union to other employees prior to the first election.

Clare's union sympathies were known to her superiors and, quite obviously, did not evoke their approval. On one occasion,[9] Priest walked up to her and inquired about the button she was wearing. She told him that it was a button to indicate that she was a member of the Union's organizational committee. He turned and walked away.

On another occasion, Priest told his employees in the crating department that they'd lose their benefits if the Union were elected. Clare, though not a member of his group, was seated nearby; Priest noted her presence by pointing his finger at her and inviting her to come over and speak to his employees if she had anything to say. The bell then rang and employees returned to work. But Priest then came up to Clare and asked privately why she favored the Union, after noting that the Respondent

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[8] Wearing a type of button which identified her as a member of the committee, as opposed to the majority of buttons which merely bespoke one's allegiance.

[9] These incidents are recited to demonstrate the Respondent's knowledge of and animus toward Clare's union sympathies and activities. There is no claim that violations of Section 8(a)(1) of the Act should be found on these bases, apparently since the evidence would be time barred for such a purpose.

could promise better benefits if the employees voted against the Union. Priest[20] then warned against any "union people fucking around with my people."[21]

(2) The Discharge and the Warnings

Clare worked through the time of the June 2, 1978 election until June 22, 1978. At that time, so the Respondent claimed in her employment compensation proceeding, she was fired for poor attendance and violation of company policies. Her policy violations were said to include smoking in no smoking areas, leaving work early and sitting down on the job, "after being duly warned." However, it is undenied that she was not told she'd been fired until sometime in the latter part of August.

Clare had gone on maternity leave on June 29, 1978 and was scheduled to return to work on August 29, 1978. The Respondent contends that it determined to fire Clare in June, and delayed telling her of its plan not to allow her to return from her impending maternity leave out of concern for her medical well-being as the baby's birth approached.[22]

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[20] Clare's testimony about these incidents was undenied.

[21] I do not credit the quavering, biased and unlikely testimony of Moore that Summers told him, a supervisory trainee at the time, that Clare and other known union sympathizers would be "taken care of" after the election. Nor do I credit the biased and implausible testimony of Sargent, also a supervisory trainee, that Summers told him and others that union adherents were to remain employed "on borrowed time." In these respects, I credit the denials by Summers.

[22] It is noted that she asked for and secured an extension of her maternity leave pursuant to a telephone call of August 7 and another of August 17 to the Respondent. Her August 7 call noted to the Respondent that her child had been born. No mention of her termination was made to her at that time, however, or on either August 12 or 17, when she again phoned relative to the maternity leave extension.

A few days after the election, on June 7, 1978, Clare was given a written warning by Barkhurst and Polivka. This warning mentioned a series of incidents alleged to have occurred between April 24 and May 24, three consisting of poor or slow workmanship, two of failure to wear safety glasses, and one of using Barkhurst's chair to sit down while working on the assembly line. The warning additionally noted her frequent and extended trips to the bathroom, as well as the bad effect her performance was said to have upon the morale of fellow workers. Contrary to several assertions within the warning itself, Clare claimed never to have been warned about any of these matters, and refused to acknowledge receipt of the written warnings by signing it on its face.

On June 26, 1978 Clare received still another written reprimand which contained a warning of termination for failure to correct the matters set forth in the reprimand or if she violated any other standards set by the Respondent. This reprimand related to five incidents. Two of them related to the very day of her first warning, June 7; it was alleged in the reprimand that Priest had warned her on June 7 about the quality of her work, and that Priest had observed her failure to avoid talking and return to work promptly from the bathroom. One related to June 12 when she was alleged to have returned late from her break, and to have been smoking in a high risk area. On June 16 Clare was said to have left her shift several minutes early, spending the time in the bathroom, before "dashing" out to have her timecard punched. And finally, on June 22 Clare was said to have been smoking and idling near the end of her shift.

(3) The Defense

In response to the allegations that Clare was both warned and discharged illegally, the Respondent contends that Clare's discharge was amply warranted by the incidents set forth above. It is further contended that the totality of such incidents points up the Respondent's justification in concluding that Clare should be regarded as a poor worker. And finally, as with all other allegations, the Respondent contends that if violations of the Act occurred, they have already been remedied.

(4) Clare's Discharge and Warnings Were Lawful

Each of the parties has exhaustively tried and briefed the issues pertaining to Clare. She was shown to be a union loyalist, though I am unconvinced that a fair reading of the record will demonstrate that her union activities were greater, or more offensive to the Respondent, than those of many other employees. And the timing of her written warnings does cause some suspicion, coming as they did so soon after the initial election campaign. Such circumstances might easily lead one to infer that the Respondent "lay in wait" for Clare's smallest error, and amassed a record.[23]

Here however, I cannot conclude that the evidence supports the inference that Clare would not have been discharged had she not been engaged in union activities. For, despite the suspicious circumstances noted above, and despite my conclusion

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[23] Clare testified that she was not warned, or told that the incidents were serious. I do not credit her in this. Instead, I believe that she simply failed to comprehend the jeopardy presented to her continued employment.

stemming from other evidence in this case that the Respondent would have had little reluctance to violate the Act, I believe that Clare's work furnished the Respondent with ample cause for discipline. And I am unable to conclude that she would not have been disciplined, or that the discipline would not have taken the form of warnings and discharge, had she not been a union sympathizer and, to some extent, an activist.

I say all of this while mindful of the failure of the Respondent to produce such important witnesses as Priest and Barkhurst. I believe that I must infer from this failure that their testimony would have proven unfavorable to the Respondent's position had they testified.

But, having said all this, I am still unable to avoid the obvious truth that Clare's discriminatory treatment must be proven by credible evidence. For I find that the Respondent's inconsistencies are insufficient to do more than raise suspicions, rather than convince.

For Clare's testimony was itself replete with inconsistency or fabrication. As I watched her testify, I concluded, from both her demeanor and her testimonial inconsistency, that she has an ability to inwardly excuse any fault, to shift the blame to others, to prevaricate and to hedge her answers. In short, she impressed me as an unreliable witness, whose account of past wrongs must be drastically discounted.

With regard to virtually every incident mentioned in the warnings given her in June 1978, she testified that she had never been previously advised of any such deficiency in her work.

Yet she admitted on cross-examination that she already knew that she was on work time when she sat down to smoke in her regular department after returning from another area where she'd been "loaned" for the day. Thus, I fail to see how any alleged failure to warn her of adverse consequences could somehow make it all right for her to sit down and smoke, despite it being near the end of the workday.

She also admitted that Priest had, indeed, told her to return to work promptly, after she'd been using the restroom one day, when he observed her standing outside its door on the loading dock, either talking to or listening to a forklift driver named Muffley.

She also admitted that Priest had, on or about June 7, 1978, rebuked or instructed her on how to tape parts to mirrors. The fact that Priest's rebuke or instruction to her did not "register" with Clare as justified cannot detract from the fact that it was given, or from its evident contradiction of her testimony that she was not ever notified of these incidents' potential harm to her work record.

Similarly she recalled being late in returning from break on June 12, 1978. She excused it as being justified by her desire to seek out Barkhurst and talk over her maternity leave. But I believe she must surely have known that she could not return late from a break without, at the least, making prior arrangements with her supervisor to be given extra time to attend to such administrative matters.

Regarding the reprimand for failing to wear safety glasses, Clare's affidavit of September 12, 1978 contradicts her testimony about never having been previously warned. But again, she excused

this by noting that she'd never heard of anyone being "written up" for such an offense. While I would agree with her that such an offense seems trivial, I cannot agree with the interference she seems to advance, that the Respondent was not within its rights in demanding adherence to safety standards by its employees, even if they had been engaged in union activities.

Clare testified that she did not regularly go into the restroom to smoke before leaving work, and that she did so only on June 16, 1978. Yet in her September 12, 1978 affidavit, Clare claimed that she had been doing this almost every day that she worked there.

Clare sought to excuse the various inconsistencies between her testimony during the hearing and that which she had previously given in various affidavits to Board personnel and to an agent of the Charging Party. She did so by noting that she was so busy with caring for her children that she became confused while giving her affidavits. But while Clare impressed me as a sincere and earnest person, and while I have no reason to doubt her testimony to the effect that she became confused while giving affidavits, I cannot find these inconsistencies to be adequately justified or warranted. Indeed, much of what I have set forth above seems to corroborate her asserted state of "confusion." But, having observed her attempts to testify credibly, and to rehabilitate her earlier testimony, I am constrained to note that however sympathetically I may view her plight, I remain unable to attach much credence to her testimony as a whole. Instead, I can only observe that she seemed unable to testify consistently, or in a manner not patently self-serving.

Contrary to Clare's depiction of herself as a good and steady worker, willing to accept instruction and responsibility, the Respondent presented the testimony of a number of Clare's former co-workers. Maxine King's testimony was thoroughly credible and, in sum, depicted Clare as a worker who failed to carry her fair share of the workload, thereby causing a morale problem to develop, which eventually resulted, in April 1978, in several employees complaining about Clare's work habits to supervission. Her testimony was supported in many respects by that of Dorothy Anderson, who, while somewhat excitable as a witness, was also credible. Similarly, the testimony of Laverne Kumm, while somewhat lacking in details, was nonetheless believable.

I conclude that the General Counsel's evidence makes out a *prima facie* case that Clare's engagement in protected conduct was a motivating factor in the Respondent's decision to discharge her.[24] However, I also conclude that the General Counsel's case is quite weak and that Clare's deficiencies as a witness detract even further therefrom. While the Respondent's evidence[25] regarding its motivation in withholding the notice of her discharge from Clare, and even its basis for determining to discharge, seems suspiciously contrived, I have concluded that such evidence, whatever its infirmities, does demon-

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[24] See *Wright Line, Inc.*, 251 NLRB No. 150 (1980).

[25] In this connection, I specifically note that I was not favorably impressed with the Respondent's evidence regarding the timing of its announcement to Clare that a decision had been reached to terminate her; nor was I favorably impressed with the Respondent's apparent inability to consistently state the basis for its decision to discharge.

strate that Clare would have been warned and discharged even in the absence of her union activities. I therefore find that the Respondent did not violate the Act by discipling or discharging Clare in any manner alleged. I shall, accordingly, dismiss each allegation of wrongdoing by the Respondent relating to Connie Clare.

X. The "Fashion Fair" Defense

I reject the Respondent's argument that no remedy is needed in this case. The essence of that argument stems from Board precedent[24] indicating the Board's approval of an employer's efforts to halt the effects of its own illegal activity. In the case of this particular Respondent, a panel majority of the Board, over the vigorous dissent of the Chairman, determined that a notice posted by the Respondent was sufficient to "expunge the ill effects normally incident to [illegal] activities" and, accordingly, dismissed certain allegations of a complaint.

While I applaud any efforts made by the Respondent to limit or halt the effects of its own wrongdoing. I must note my own doubts that the Board's pronouncements on the subject may be said to have ever risen to the level of a "doctrine," as characterized by the Respondent. Instead, each case cited by the Respondent, or which I have read independently, leads me to conclude that the Board has carefully avoided such a conclusion. It is my opinion that the thrust of such cases is to encourage attempts to cease or remedy wrongdoing but, all the same, to re-

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[24] *Fashion Fair, Inc.*, 150 NLRB 1435 (1966); see also, for example, *Kawasaki Motors Corporation, U.S.A.*, 231 NLRB 1151 (1977), involving this same facility.

serve the vindication of public rights to the Board itself.

In any event, there are substantial reasons to believe that the "doctrine" should not be applied in this case.

First of all, the "doctrine" has already been applied to this same Respondent. Yet, only a year or two later, it is observed that this Respondent engaged in numerous and serious unfair labor practices, and interfered unlawfully with the employees' free choice in a representation election.

Secondly, the very severity, breadth and variety of unfair labor practices committed by this Respondent seem to fatally detract from the good impact its disclaimers might have had to dispel any lingering coercive effects among its employees. In short, I know of no valid reason many employees, either witnesses to or victims of unlawful action by the Respondent, might have for trusting the words of the Respondent regarding its intentions to refrain from illegal activities in the future.

Thirdly, the "disclaimers" were very general in their language. This defect might not be viewed as being of great moment had the disclaimers not also so vigorously protested the Respondent's innocence of all wrongdoing.

And finally, I believe that a remedy is needed for the Respondent's flagrant interference with the free choice of the electorate, regardless of what the assurances against future wrongdoing might have been. Similarly, I have determined that employee Bennett is entitled to reinstatement and backpay. The Respondent's notices to employees fail to make provision for any of these needed remedies.

XI. Procedural and Evidentiary Matters

In the course of this trial a number of motions were addressed to me. In most instances, I ruled upon them at the trial; often rulings were reserved; in still other instances, motions were renewed after my ruling.

Included among the motions were those of the General Counsel that I recind or modify the views expressed as findings in my letter-order dated December 5, 1979 (GC Exhibit 1(ii)), that I strike the testimony of certain witnesses for having violated the rule of sequestration, and that I allow the General Counsel's pleadings to be conformed to the proof offered in this case.

Also included are the Respondent's motions that I strike certain testimony because of the General Counsel's failure to provide the Respondent with copies of affidavits, and the Respondent's motion for a mistrial, essentially based upon the same conduct.

Having now reviewed the record, I have determined to overrule all outstanding motions by any party. I do so because of my belief that the record adequately explains and supports each ruling I made during the trial, as well as this ruling dealing with all remaining motions. The record seems adequate to enable any party aggrieved by my rulings to secure proper review thereof.

However, I grant the General Counsel's post-trial motion to amend its brief to me by substitution of a new page which corrects the inadvertent typographical omission of one line.

The Remedy

Having found that the Respondent has engaged in

certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Dan Bennett, I find it necessary that the Respondent be ordered to reinstate him to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing, if necessary, anyone who may have been hired to perform the work which he was performing at the time of his severance on April 10, 1979. Additionally, the Respondent will be ordered to make Dan Bennett whole for any loss of earnings he may have suffered by reason of his unlawful termination. Backpay is to be computed in the manner prescribed in *F.W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[27]

The Objections

Having found that the employer engaged in preelection misconduct interfering with the laboratory conditions required for a free and uncoerced choice on the question of representation, I shall recommend that the election of April 18, 1979 be set aside and that a rerun election be conducted at such time as the Regional Director for Region 17 deems appropriate.

Conclusions of Law

1. The Respondent is an employer within the

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[27] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). See also *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Dan Bennett on or about April 10, 1979 because of Bennett's support for and activity on behalf of the Union the Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By promising benefits to employees in order to persuade them to stop supporting the Union, and by threatening to discharge, to impose more onerous job duties, to close or move the plant or any of its work, to withhold promotions, job reviews or benefits, or to make employees' selection of a union futile, the Respondent violated Section 8(a)(1) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not engaged in unfair labor practices other than those specifically found herein.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

Order[21]

The Respondent, Kawasaki Motors Corporation, U.S.A., Lincoln, Nebraska, its officers, agents, successors and assigns, shall:

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[21] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against employees in regard to hire or tenure of employment because of their activities on behalf of a labor organization or for engaging in any activity protected by Section 7 of the Act.

(b) Threatening employees with discharge or other reprisals because of their activities on behalf of or support for International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, or any other labor organization.

(c) Promising benefits to employees in order to persuade them to stop their activities on behalf of or sympathies in favor of a labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Dan Bennett immediate and full reinstatement to his former, or substantially equivalent position of employment if his former position of employment no longer exists, without prejudice to his seniority or other rights and privileges, and make him whole for lost earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copy-

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Regulations, be adopted by the Board and becomes its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ing, all personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its Lincoln, Nebraska facility copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the representation election conducted on April 19, 1979 in Case No. 17-RC-8473 be, and the same hereby is, set aside, and that Case No. 17-RC-8473 be, and the same hereby is, remanded to the Regional Director for Region 17 for the purpose of conducting a new election.

Dated: January 29, 1981.

Frederick C. Herzog
Administrative Law Judge

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[29] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Best Copy Available

APPENDIX

FORM NLRB-4727 (5-47)

30-(SF)-20-81

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which all sides had the opportunity to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice to ensure you of your rights under the law and to advise you of the actions we are required to take to remedy our violations of the Act.

The Act gives employees these rights:

To engage in self-organization; *
To form, join, or assist any union;
To bargain collectively through representatives of their own choice;
To engage in activities together for the purpose of mutual aid or protection or collective bargaining;
To refrain from the exercise of any or all such activities.

WE WILL NOT fire or otherwise discriminate against any employee for engaging in union activities or giving aid or support to any labor organization.

WE WILL NOT threaten employees by advising them
--that they or others may be discharged,
--that we might impose more onerous job duties,
--that we might close or move our plant or any of its work,
--that we may withhold promotions, job reviews or benefits, or
--that selection of a union would be futile.

WE WILL NOT promise benefits to employees in order to persuade them to stop their union activities or support.

WE WILL NOT in any like or related manner interfere with your rights set forth above, which are among those protected by the National Labor Relations Act.

WE WILL offer Dan Bennett immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Dan Bennett whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

KANSAS RIVERS CONVENTING, U.S.A.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, The Gateway Center, Suite 614, Fourth at State, Kansas City, Kansas 66101 Telephone: (816) 374-5151